No. 84-

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

EMORY WORTH BROWN, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Emory Worth Brown, Jr.
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VOLUME II
APPENDIX

CORRECTED COPY

VOLUME II

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Unpublished

No. 83-5135

United States of America, Appellee,
v.
Emory Worth Brown, Jr., Appellant.

No. 83-5136

United States of America, Appellee,
v.
Emory Worth Brown, Jr., Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge.

Argued March 8, 1984.
Decided August 2, 1984

Before WIDENER, PHILLIPS, and MURNAGHAN, Circuit Judges.

Stanley E. Sacks (Andrew M. Sacks, Sacks, Sacks & Larkin on brief) for Appellant; Raymond A. Jackson, Assistant United States Attorney (Elsie L. Munsell, United States Attorney on brief) for Appellee.

PER CURIAM:

Emory Worth Brown appeals his conviction in a trial by jury of one count of receiving a gratuity in violation of 18 U.S.C. 201(g), and three counts of conflict of interest in violation of 18 U.S.C. 208(a). We affirm.

I.

A.

At the time of the alleged crimes, Brown was commanding officer of VF-84, a squadron of F-14's stationed aboard the U.S.S. Nimitz. In 1979, the Navy entered into a contract with a civilian motion picture production company in connection

with the production of the film "The Final Countdown," to be produced by one Peter Douglas. This contract provided that Brown's flight squadron was to fly in certain scenes in the movie, and that the Navy was to receive $4,000 per flight hour for use of its personnel and equipment. Brown was responsible for coordinating the filming of Naval aircraft. He was also required to document all hours flown so that the movie producer might be properly billed.

According to the testimony at trial, the contract dictated that no Naval personnel would be paid for any work done on the movie while performing their official functions, but that the producer would make certain payments to the health and welfare fund of the Nimitz and the flight squadron from the $250,000 escrow

account established to pay Navy connected costs. because the production of the movie required some remodeling of certain areas of the carrier, the contract provided that all unused property purchased through the Naval procurement system was to remain on the carrier after the movie's completion. Finally, the contract did not allow the producer to contract with any Naval personnel for the performance of movie related services. Thus, according to the testimony of the Navy's project officer for the movie, there would be no reason for Commander Brown to receive a check from the movie producer unless it was destined for the ship's recreation fund, in which case Brown should then have forwarded it to the Secretary of the navy.

Nevertheless, the testimony at trial

indicated that Brown did receive such a check and did not forward it. In July-August of 1979, Brown submitted to Douglas, as producer, an invoice from Binnacle Enterprises, his own table-making business, allegedly for "set materials". Douglas immediately told the assistant producer to have a check drawn and hand-delivered the same day to the address of Binnacle Enterprises, which was in fact Brown'as residence. Trial testimony indicated that this method of payment was highly irregular. Brown, upon receiving the check for $5,563.48, promptly deposited it into his and his wife's joint checking account. According to the testimony of FBI Agent O'Brien, Brown conceded that the set materials in the invoice were not in fact purchased from Binnacle Enterprises and that the

invoice was bogus.

The evidence at trial also suggested a reason for Douglas's irregular payment of the check to Brown. The movie producer originally had estimated that production of "The Final Countdown" would require approximately 30 hours of flight time. Brown concededly was aware of this estimate. Ultimately, Brown submitted flight hour records indicating that his squadron had flown 32.5 hours. According to the testimony of Agent O"Brien, however, Brown admitted that he should have charged Douglas for 150 hours of flight time, so that his understatement of hours slighted the Navy and benefitted the producer in an amount on the order of $435,000. Furthermore, the evidence showed that in July 1979, when the producer and the Navy were engaged in a

dispute concerning payment of certain administrative expenses, Brown telegraphed Douglas urging him to pay promptly, since failure to do so might lead to a naval inquest that might in turn disclose that flight hours had been underbilled.

On this evidence, Brown was convicted under the bribery count, of the lesser included offense of illegally accepting a gratuity in violation of 18 U.S.C. 201(g).

B.

In the spring of 1978, Brown and Francis M. Sweeney, a former naval officer stationed at Oceana naval Air Station in Virginia Beach, established the informal business under the name Binnacle Enterprises. Their primary activity was the production and sale of

tables made from hatch covers. Sweeney purchased the hatch covers and Brown contributed other materials and labor. Brown and Sweeney either sold the tables themselves or placed them for sale at the Aquarius Gift Shop on a commission basis, the shop's proprietor receiving one third of the proceeds. Testimony indicated that the unit fair market value of the tables in their marketing area was approximately $199.00.

Under navy procedures, Brown could then submit appropriate documents containing a description of the item to be purchased, the cost, and the location at which the item was available, and could quickly receive cash with which to purchase any item costing less than $150.00. The evidence at trial showed that on June 19, 1979, Brown submitted a

requisition to the supply officer for the purchase of a nautical block lamp available at Binnacle Enterprises containing the notation "attention Mrs. Sweeney." Brown then called Mrs. Sweeney and told her to confirm, when the supply officer called, that such a lamp was selling for $135.00, which she did. On July 25, 1979, Brown submitted a requisition to the supply officer, this time for the purchase of a table from Binnacle Enterprises for the price of $145.00. The table was in fact purchased. Using the same procedures, Brown caused to be purchased another table at the same price. Although trial testimony indicated that the price of $145.00 was very low for the tables sold, Brown conceded that he had made some profit from the sale of the tables and

that he had not disclosed his financial interest in Binnacle Enterprises to the navy at the time he submitted the purchase requests.

On this evidence, Brown was convicted of three counts of conflict of interest.

II.

To his ultimate conviction on four of the seventeen counts charged in connection with his "Final Countdown" conduct, Brown assigns nine legal errors for our review. In summary, they challenge the sufficiency of the evidence to convict him of the lesser included receipt of gratuity offense, the propriety of the trial court's supplemental instruction on that issue, the sufficiency of the evidence to convict him on three of the conflict of interest counts, the admissibility of the

testimony of two government witnesses, the trial court's refusal to declare a mistrial for juror misconduct, and the trial court's admission of statements made by the defendant in plea negotiations leading to a guilty plea later withdrawn.

Of these assigned errors, only one, the first, requires extended discussion.

A.

Illegal receipt of a gratuity, a lesser-included offense of bribery of a public official, is defined as follows:

> (g) Whoever, being a public official, ... otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of

value for himself for or because of any official act performed or ... Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. 201(g) (emphasis added). Undisputed evidence established that Brown received, at Peter Douglas's direction, a check in the amount of $5,563.48, and that at the time he received this check he was a public official. It was also established beyond dispute that brown's receipt of the check was"otherwise than as provided by law for the proper discharge of official duty." Brown's argument therefore focuses on the alleged insufficiency of the evidence to show that this payment was received "for or because of any official act" he performed or would perform in the

future. The argument has two prongs.

The first is that there is no evidence identifying the "official act" for or because of which the payment could have been made. Second, since the evidence upon which he was convicted was presented in support of a bribery charge on which he was acquitted, the jury must necessarily have rejected the government's theory that the bribe was received for falsely reporting the flight hours. This necessarily left no basis upon which the jury could rationally have found that Brown received a gratuity, though not a bribe, for or because of the only "official act" possibly supported by evidence.

We disagree. As to the latter point, a conviction is not invalidated by its apparent conflict with what could be

thought the jury's "necessary holding" in rendering another, related verdict. Hamling v. United States, 418 U.S. 87, 101 (1974); United States v. Dotterweich, 320 U.S. 277, 279 (1943). As to the first point, there was substantial evidence to support the inference that Brown did in fact receive the check "for or because of" either understating the number of hours for which the producer would be charged or gratuitously remaining silent when disclosure of this fact was required by Naval regulations, either of these being "official acts" within the meaning of the statute.

B.

We have carefully considered the other eight assignments of error and find no merit in any of them.

The objection to the supplemental

instruction on receipt of a gratuity issue essentially focuses upon the court's use of the phrase "as a result of the performance of an official act" rather than, as requested by the defendant, "because of and in exchange for duties that he was required to perform." Viewed in total context of the original instruction and the form of the jury's request, and taking into account the discretion reposed in the trial court, this supplemental instruction cannot be found prejudicial. The words "result of" as included in the challenged instruction are essentially synonymous with and supplemental to the statutory language as used in the original instruction, "for or because of." In contrast, defendant's requested language "in exchange for" imports a quid pro quo

element that is not required to establish guilt of this offense. See United States v. Neiderberger, 580 F.2d 63, 68-69 (3rd Cir.), cert. denied, 439 U.S. 980 (1978).

The argument that there was insufficient evidence to convict on the three conflict of interest counts borders on the frivolous. It rests essentially on the suggestion that the statute simply was not designed to proscribe conduct so insubstantial in terms of volume and profit as was here proven. While it may well be a matter for wonder why one in this defendant's position would engage in so banal a pursuit as that he sought to depict here, there is nothing in the statute to suggest a de minimis limit on the conduct it proscribes. The "substantiality" required by the statute relates only to the charged person's

"participation" in the proscribed conduct, not to its volume or to the profit realized from it. here the evidence was overwhelming to support a jury finding on each of the counts in question that "Brown participated personally and substantially" in the purchase of property for the United States from an entity in which he knew he had a financial interest, in violation of 18 U.S.C. 208(a).

The challenges to the admission of testimony by two qualified government witnesses to, respectively, the Navy standards of conduct governing the acceptance of gifts by navy personnel and the terms of the movie contract are without merit. Admission of the testimony in each case was well within the discretion of the trial judge.

We have also considered the defendant's assignment of error respecting the trial court's asserted refusal to allow the defendant to make a "missing witness" argument to the jury, the refusal to declare a mistrial for juror misconduct, and the admission of plea negotiations, and we find no basis for reversal in any of these.

The judgment is therefore

AFFIRMED

APPENDIX C

FILED
SEP 21, 1984

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-5135

United States of America,

Appellee,

versus

Emory Worth Brown, Jr.,

Appellant.

No. 83-5136

United States of America,

Appellee,

versus

Emory Worth Brown, Jr.,

Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge

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The appellant's petition for

rehearing and suggestion for rehearing en banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips, with the concurrence of Judge Widener and Judge Murnaghan.

For the Court,

JOHN M GREACEN
CLERK

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 83-5135 & 83-5136

EMORY WORTH BROWN, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

APPELLEE

PETITION FOR REHEARING EN BANC ON BEHALF OF APPELLANT, EMORY WORTH BROWN, JR.

TO: The Honorable Judges of the United States Court of Appeals for the Fourth Circuit

INTRODUCTION

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, and the applicable

Rules of this Circuit, Appellant, Emory Worth Brown, Jr., hereinafter sometimes referred to as "defendant", respectfully petitions this Court for a rehearing and/or a rehearing en banc of the decision of a Panel of this Court issued on August 2, 1984, under the short style of United States v. Brown, hereinafter referred to as "the Opinion." Page numbers set out herein refer to pages in the appendix unless otherwise described as page numbers in the trialtranscript.
The Opinion affirms the convictions of the defendant of one (1) count of receivng a gratuity in violation of Title 18 U.S.C. 201(g) and three (3) counts of conflict of interest in violation of Title 18 U.S.C. 208(a).

Counsel for the defendant respectfully represents that a rehearing is both necessary and compelled due to the existence, in counsel's judgment, of each of the following substantial situations, each one of which alone presents a

clear ground for rehearing:

1. The Opinion overlooks material facts in the record in concluding that the defendant admitted that he understated the number of hours of flight time charged to the movie, which formed the basis for the defendant's conviction, of receiving a gratuity, because the record clearly establishes that the hours flown in excess of the 32.5 hours charged to the movie were properly charged to training and/or cross country flying in accordance with Navy directives.

2. The Opinion overlooks material facts in the record by holding that the telegram sent by the defendant to Douglas urged Douglas to pay certain administrative expenses promptly in order to avoid a Naval inquest which might disclose that flight

hours had been underbilled, which holding formed the basis for the defendant's conviction of receiving a gratuity.

3. The Opinion overlooks material facts in the record by holding that the check received by Brown was "for or because of" either understating the number of hours of flight time charged to the movie or gratuitiously remaining silent when disclosure of the fact that the number of hours was underreported was required by Navy regulations, where the clear evidence was the such check was to reimburse Brown for monies spent directly out of his own pocket for renovation and remodeling of his squadron's ready spaces and for expenses incurred by him personally in conjunction with the filming.

4. The Opinion overlooks material facts in the record by holding that the defendant

made a profit from the sale of hatch cover tables and a nautical block lamp, which formed the basis for defendant's conviction on the three (3) counts of conflict of interest, where the evidence was that the defendant made no such profit.

Defendant, by counsel, respectfully submits that each of the above-described situations mandates a rehearing.

REASONS FOR REHEARING

I. THE OPINION OVERLOOKING MATERIAL FACTS IN THE RECORD IN CONCLUDING THAT THE DEFENDANT ADMITTED THAT HE UNDERSTATED THE NUMBER OF HOURS OF FLIGHT TIME CHARGED TO THE MOVIE, WHICH FORMED THE BASIS FOR THE DEFENDANT'S CONVICTION OF RECEIVING A GRATUITY, BECAUSE THE RECORD CLEARLY ESTABLISHES THAT THE HOURS FLOWN IN EXCESS OF THE 32.2 HOURS CHARGED TO THE MOVIE WERE PROPERLY CHARGED TO TRAINING AND/OR CROSS COUNTRY FLYING IN ACCORDANCE WITH NAVY DIRECTIVES.

The Opinion asserts that according to the testimony of Agent O'Brien, the defendant admitted that he "should" have charged Douglas for 150 hours of flight time thereby slighting the Navy and benefitting the producer. That is an incorrect statement of fact.

At no time did the defendant ever concede that he should have charged for more flight hours than he did. A review of Agent O'Brien's testimony indicates that the defendant told O'Brien that he "could" have charged Douglas for 150 hours (app. 196).

DIRECT EXAMINATION: (Record p. 594)

GOV'T: Okay. Now, did you have occasion to question the defendant about accounting for the flying hours during the making of the movie "The Final Countdown".?

O'BRIEN: Yes, I did.

GOV'T: All right. Did he relate to you how many hours he had flown in support of the movie?

O'BRIEN: Well, he indicated that he, on official records, had flown 32.5 — thirty two and a half hours for the production of the movie; however, he indicated that he — he could have charged Mr. Douglas for at least a hundred and fifty hours.

CROSS EXAMINATION: (Record pp. 613-615)

DEFENSE: All right. Now you remember being asked some questions by Mr.

Jackson concerning the hours charged, the flying hours?

O'BRIEN: Uh-huh.

DEFENSE: And you said that he could have charged for a hundred and fifty hours. That's what he told you?

O'BRIEN: Yes, sir.

DEFENSE: All right, sir. But he told you more than that about those hours, didn't he, that you haven't told us yet?

O'BRIEN: If you ask me questions, I'll try to tell you.

DEFENSE: All right. I direct your attention to page 4, about midway down --

O'BRIEN: Excuse me. Is this the second statement?

DEFENSE: Yes. Page 4.

O'BRIEN: Uh-huh.

DEFENSE: Didn't Commander -- about midway down, the third paragraph on that page. Didn't he tell you that "he carefully reviewed each flight hour and decided to charge the production company only the time actually spent for filming and charge the other flight hours against the allocated training hours for the squadron"?

O'BRIEN: Yes, he told me that.

DEFENSE: All right. All right, sir. And then didn't he also tell you that when he refigured the flight hours spent in support of the movie, he took out such things as the time spent on deck for refueling, the time taken in transit from the base to the area where the filming was done, and the down time while the planes were flying but no actual photographing was taking place."?

O'BRIEN: Yes.

DEFENSE: And then he also told you that "All the crew members in the squadron who were involved in the filming of the movie were consulted regarding the hours charged to the movie company and knew that Brown was only charging the movie company for hours spent in filming."

O'BRIEN: Yes, Sir.

DEFENSE: Now, also, finally, Mr. O'Brien, Commander Brown denied any bribe, didn't he.

O'BRIEN: Yes, he did.

While it is true that approximately 150 hours of flight time were incurred by the

defendant and his squadron, 117.5 of those hours were properly charged to training pursuant to naval directives. From the very beginning it was understood and agreed that only 30 flight hours were budgeted for and would be charged to the motion picture company. Robert D. Shupe, retired Navy Commander who was the Navy Cost Collector for the movie and who was called as a prosecution witness, confirmed that 30 hours was an established number of flight hours that the squadron was expected to fly for the motion picture (Tr. 511-517).

DIRECT EXAMINATION: (Record pp. 511-512)

GOV'T: Prior to the initiation of flying support for the movie was there an established number of hours that VF-84 was expected to fly?

SHUPE: Yes.

GOV'T: And how many hours was that?

SHUPE: Thirty.

GOV'T: Now, what type of aircraft -- what type of aircraft was

expected to fly thirty hours?

SHUPE: F-14.

DIRECT EXAMINATION: (Record p. 513)

GOV'T: Okay. Now once the thirty hours had been established as the projected amount of hours the F-14's would fly, that is, the defendant's squadron —

COURT: You mean each F-14 plane in the squadron 84 was to fly thirty hours a month?

SHUPE: No. No, No. Total flight time of all the planes in VF-84 were to fly thirty hours. Thirty hours was the amount targeted to be expended to film the movie.

GOV'T: In any event, was it correct that thirty hours was the total projected —

SHUPE: Yes, total hours —

GOV'T: — to be flown by the squadron?

SHUPE: Thirty hours was the figure that was provided by the technical adviser, Captain Graves.

DIRECT EXAMINATION: (Record pp. 515-516)

GOV'T: I'd like to show you what has been previously marked as

Government exhibit 18 for identification. And what is the exhibit, please?

SHUPE: This is a message from Fighter Squadron 84 to Commander, Naval Air Force, Atlantic Fleet.

GOV'T: Is that the message you received from the defendant?

SHUPE: Yes, it is.

GOV'T: And what did the defendant tell you he was going to do about flying hours in the message?

SHUPE: He said he was going to fly approximately thirty-five hours for the movie and sixty-five hours for aircrew training.

GOV'T: Now, was this thirty-five hours for the movie in addition to the thirty already projected?

SHUPE: No. This was the original thirty.

GOV'T: Now, for the month of June 1979, after you had received that message, did you eventually get a report of how many hours had been flown in June?

SHUPE: Yes, I did.

GOV'T: Okay. I show you what has been previously marked as Government exhibit 35 for identification,

and ask you whether you recognize that?

SHUPE: Yes. This is the budget OPTAR report for the month of June, reporting thirty-two and one-half hours.

GOV'T: Okay. And was that thirty-two and a half hours flying time for the movie?

SHUPE: Yes, that's right.

Commander Shupe, therefore, confirmed that the defendant had, sent him a naval message through official channels separating the flight hours to be charged to the motion picture from those to be charged to training as he had been directed to do. Shupe asserted that 30 hours was the contracted figure based on a dollar constraint (TR. 533).

CROSS EXAMINATION: (Record p. 533)

DEFENSE: All right, sir. And at the beginning, it was projected, I think you testified, that thirty hours would be required to be flown in support of the movie?

SHUPE: That's correct.

DEFENSE: And do you know where you learned that fact?

SHUPE: Yes. In that particular document there was a reference there about the technical adviser, Captain Graves, who would provide information as to the exact requirements, and he provided us with a memorandum with the best know requirements at that time.

DEFENSE: All right, sir. Now of course, this was a new experience for you, was it not?

SHUPE: That's correct.

DEFENSE: This cooperation between the movie people and the Navy?

SHUPE: Exactly.

DEFENSE: And you really had no guidelines as to how to do it, that is, from anything that had ever been done before?

SHUPE: Right.

DEFENSE: You all were sort of playing it as you went along?

SHUPE: Correct.

DEFENSE: ...Am I correct in assuming that the thirty hours projection was also something that nobody

really knew, but that's what was projected?

SHUPE: Well, it was something that was projected based on a dollar constraint.

DEFENSE: Meaning that for the amount of money that somebody wanted to spend, that's what they wanted to hold it to?

SHUPE: Exactly.

Commander Shupe testified that the defendant had properly reported that the flying for the month of June in support of the motion picture company was 32.5 hours (Tr. 537).

CROSS EXAMINATION: (Record p. 537)

DEFENSE: And would you know for us for our purposes, approximately when the actual costs started; that is, when did the movie start, from your standpoint, of costs being incurred?

SHUPE: All right, We established our criteria on the 31st of May and VF-84 reported in their June BOR for May expenditures a small amount of admin expenditures. In June, the BOR for June that was dated the 4th or 5th of July,

they reported the $16,000.00, the first increment of Admin charges and the first flying hour charges of thirty-two and a half.

DEFENSE: All right. But what do you mean by "BOR"?

SHUPE: That's the budget OPTAR report.

DEFENSE: All right.

SHUPE: That's the accounting report or the accounting document that each squadron provides for the accountants.

Commander Shupe also asserted that he "knew that all along" that flying was going to be apportioned between training and the movie and he corroborated the 32.5 flight hours flown and confirmed that there was no other movie flight activity other than the June flying (tr. 543-545).

CROSS EXAMINATION: (Record p. 543)

DEFENSE: ... you knew from June — your office, at that level, knew from June 21, 1979, that — that the flying to be done thereafter was going to be apportioned between

training and movie exclusive use, didn't you?

SHUPE: Well, I knew all along. That's the whole — All the flying that the squadron does right now is training. When they're back on the beach, that's all the kind of flying they do — is training.

CROSS EXAMINATION: (Record p. 544)

DEFENSE: In other words, from June 21st of 1979, if you had any reason to want to further examine what's being allotted to training and what's being allotted to ... movie flying, you had an opportunity to do it, didn't you?

SHUPE: Well, there was no reason because for the June BOR, only thirty-two and a half hours were reported as flown ... and that was all that was reported. So I didn't have any reason to go back and question that. We had programmed thirty hours. So we had flown thirty-two and a half hours.

CROSS EXAMINATION: (Record p. 545)

SHUPE: ... we sent a message in August asking if any flying activity took place in July. The July BOR reported no flying activity, and I sent a message to both the attack squadron — and I knew

there was no helo flying — and I sent a message to VF-84 and VA-35 and asked them to reconfirm the BOR data that reported no flying activity in July.

DEFENSE: Well, in other words, whatever squadrons you asked in July, whether there was any flying, they all reported no activity?

SHUPE: That's correct.

Commander Shupe confirmed that Brown had conformed explicitly with his request to itemize all movie company expenditures (TR. 545-547).

DIRECT EXAMINATION: (Record p. 545-547)

DEFENSE: ... and you sent a message to him in Rota, Spain?

SHUPE: Correct.

DEFENSE: ... and you requested that he send you a detailed itemization of the costs?

SHUPE: Correct.

DEFENSE: So that you could, in turn, explain them to whoever wanted an itemization from your office, correct?

SHUPE: Well, it wasn't so much my

office. It was our superior, Commander in Chief, Atlantic Fleet.

DEFENSE: All right, sir. What you wanted to do was to be able to itemize it for them, —

SHUPE: Correct.

DEFENSE: — and so you asked Commander Brown to itemize it for you?

SHUPE: Correct.

DEFENSE: Now, he sent you copies of every 1348 that was ever used in support of the movie, didn't he?

SHUPE: Correct.

John Hyde, who was in charge of motion picture productions for Aspen Productions, testified that it was his understanding with the Navy that as long as the flying was for realistically justifiable training missions, refueling missions, or other flying that the flyers had to do to keep their qualifications, then the movie company would not be charged for those flight hours (Tr. 136-137).

CROSS EXAMINATION: (Record p. 136-137)

DEFENSE: Now, based on that firsthand participation and observation, what was the understanding between the Navy and the film people about charges for flight hours for — well, for flights from Oceana to Key West, for example, when there was no actual filming taking place? What was your understanding?

HYDE: My understanding — and it was my understanding from the beginning, both with, say, long discussions with Peter Douglas, that as long as they were realistic, justifiable training missions, refueling missions, or whatever, that the flyers had to do to keep their qualifications, then we would not be charged. — but when we had specifics — for instance, when we had an F-14 shoot down a Japanese Zero — it wasn't considered as a normal training exercise.

Hyde specifically testified that the defendant never solicited, suggested, asked or requested anyone at Aspen Productions to give him anything so that he would charge less hours, and that no one ever gave the defendant anything of

value to pursuade him to charge less hours (Tr. 143-145).

CROSS EXAMINATION: (Record p. 143-145)

DEFENSE: Now, Mr. Hyde, to your knowledge, did Commander Emory Brown ever solict a bribe from Aspen in order to charge you less for the flight hours?

HYDE: No, sir.

DEFENSE: Do you know of Commander Brown ever, soliciting, suggesting, asking, requesting, anybody at Aspen Productions to give him something so he'd charge you less hours?

HYDE: No, sir.

It is important to note that the flying for the movie was originally scheduled to be performed out of NAS Oceana, but was changed by the Navy to NAS Key West. This required the defendant and his squadron to fly to NAS Key West on a regular basis. These hours were (the 150 hours cited by the defendant as potentially chargeable to the movie and were) legitimately

charged to training time pursuant to Navy directives.

Lieutenant Kevin Miller (Tr. 667-670, 675), Commander John Eastman (Tr. 696-697) and Commander Richard Farrell (Tr. 852-857) confirmed that cross-country flights between Oceana and Key West were legitimate charges to training.

DIRECT EXAMINATION: (Record p. 667-670)

DEFENSE: I think I asked you, Lieutenant: Based on your experience as related by you, described to us today, were those flights that you coordinated back and forth to Key West in relation to the movie -- were they cross country flights, in your Naval judgment, as that term is used in the Navy?

MILLER: Yes, sir. Every time we get in the airplane and we -- in a time of budgetary constraints, any time we try to get a certain number of flight hours per month for each pilot -- every crew member to maintain readiness. Commander Brown specifically tried to get every single crew member involved in the flying for the movie because that was what we were doing at that time frame -- for everybody to maintain

their proficiency — and so, yes, in fact they were training flights.

DIRECT EXAMINATION: (Record p. 696-697)

EASTMAN: I was the maintenance officer in the squadron at the time of "The Final Countdown", and my responsibility was to make sure the airplanes were properly configured. That means with the proper ordnance load, that they were maintained properly, that they all had basically the same numbers on them so that any time the movie company took pictures, it would be the same airplane, essentially; it would be easier for editing; and specifically, of course, would be to supply the airplanes that were used down in Key West during the major part of the tropical scenes in the film.

DEFENSE: Do you know of your own knowledge whether any of VF-84's planes went to Key West?

EASTMAN: Yes, sir, they did.

DEFENSE: And where were they flown from to Key West?

EASTMAN: From Oceana to Key West.

DEFENSE: And are you familiar with cross country flights?

EASTMAN: Yes, sir, I am.

DEFENSE: Were they not cross-country flights?

EASTMAN: They indeed were.

DIRECT EXAMINATION: (Record p. 852-853)

DEFENSE: You are a pilot?

FARRELL: Pilot.

DEFENSE: And did you ever go to Key West?

FARRELL: Yes, sir. I did.

DEFENSE: Fly in some movie scenes?

FARRELL: Yes, sir.

DEFENSE: Did you ever fly your plane down there from Oceana?

FARRELL: Yes, sir, I did.

DEFENSE: In you judgment, based on your participation, were those flights from Oceana to Key West cross-country flights?

FARRELL: To down there -- to and from --

DEFENSE: Yes.

FARRELL: -- were basically, yes, sir, cross-country.

DIRECT EXAMINATION: (Record p. 855-857)

DEFENSE: All right. Commander, what I'd like to know is: Did you yourself -- do you know of anything with certainty as to whether or not that subject matter ever came up in Key West -- and the subject matter is division of hours, flight hours -- between training and between direct movie company use?

FARRELL: Yes, sir. There was going to be a division of movie hours and training hours.

DEFENSE: All right. Now, did you know that or not at that time because you were a Navy pilot, flying down there and participating in the movie? Did you know it and learn it in that capacity?

FARRELL: Yes, sir.

DEFENSE: You said something about a team. You were a member of a team who were flying in the movie?

FARRELL: I was -- I flew almost every flight involved with making the film, I was on the schedule. I was one of the primary pilots that flew, and because of the need to keep continuity, one of us had to be the guy that -- even though we took different people up, somebody had to have been

there before to kind of make things go smoothly, and I was the pilot designated as the lead in the filming.

DEFENSE: All right, sir. What I really want to ask you is: When that subject came up, to your knowledge, about the division that I've talked about, can you tell me — and you can estimate that, I believe -- timewise, was that early on in the filming or did that come up when the filming was almost over with, or what?

FARRELL: It came up right at the beginning of the filming — within the first week.

Commander Farrell confirmed that training and motion picture flying were being simultaneously conducted at Key West (Tr. 871-872), and testified that the defendant properly charged to the motion picture company that flying time which was not in direct support of the film (Tr. 878-880).

DIRECT EXAMINATION ,OUT OF THE PRESENCE OF THE JURY.: (Record p. 871-872)

DEFENSE: Do you have an opinion, based on

your experience as a pilot and your participation in the movie, as to whether or not there was actual flying going on that was consistent with and was actual training? ... In other words, were you all flying training hours as well as being down there for the movie at the same time?

FARRELL: Yes, sir, we were.

DEFENSE: All right. Was there discussion — Did Commander Brown say anything to you or in your presence about charging — properly charging flying hours to training where it properly could be done so?

FARRELL: Yes, sir. He told me that was his plan.

DEFENSE: All right. And to charge the movie company where it was directly and exclusively for the movie?

FARRELL: Yes, sir. That was the solution to the problem of the cost being so high.

COURT: What was the solution to the problem?

FARRELL: Solution was to charge not every flight from takeoff to landing to film effort if — just to charge the portion of the flight that was related to the film —

filming, use — take that portion and charge that to the company. The rest of the flight, takeoff, landing, refueling operations, things that we did as basic training functions and proficiency — would improve pilot proficiency, wouldn't be charged towards the company.

DIRECT EXAMINATION: (Record p. 878-880)

DEFENSE: Did you have any discussion with Commander Brown concerning the projected cost of flight hours and the movie cost -- the cost to the movie people of flight hours?

FARRELL: Yes, sir, I did.

DEFENSE: What did you tell Emory Brown and what did he do?

FARRELL: He told me that because of the increased cost per hour that we would have to look at each flight and break down the flight portions, to allocate some of the flight to training purposes and other portions of that particular flight would be apportioned for filmmaking and would be allocated to film production.

DEFENSE: Did he ever say anything one way or the other about allocating it in a way that wasn't accurate or true?

FARRELL: No, sir.

DEFENSE: To your knowledge, was there ever any suggestion made at any time during the filming and after the filming to inaccurately charge something to training that should have been charged to the movie company?

FARRELL: No, sir.

Admiral George Kinnear, who was the Commander, Naval Air Forces, Atlantic Fleet during the period of the motion picture production and was in fact Brown's ultimate superior, testified that he had formulated a policy, that less than 40 hours of flight time including the F-14s from Commander Brown's squadron and the helicopters were to be flown for the motion picture (Tr. 1217).

CROSS EXAMINATION: (Record p. 1217)

DEFENSE: And did you not formulate a policy as to flight hours or -- well, did you formulate the policy?

KINNEAR: I formulated the policy and -- you'll have to realize I'm drawing on memory. I've reviewed

no notes and consulted with none of my staff in this -- former staff in this respect, but the estimate that there was to be less than forty hours of flying time -- and I believe that included the F-14's and the helicopters -- that's the only thing I remember being included in that -- the upper estimate of what those flying hours would cost was $250,000.

Admiral Kinnear asserted that he "gave some definitive guidance in that respect that any flying that was in the training plan..."it is not necessary that that be charged against the movie (TR. 1218-1219). Admiral Kinnear further asserted that anything that was properly training was to be charged not to the movie company but to training (Tr. 1219).

CROSS EXAMINATION: (Record p. 1218-1219)

DEFENSE: All right, sir. Now, in addition to the dealing with the estimated cost and number of hours, didn't you also formulate some general policy as to which hours would be charged to the movie company and which hours would not be charged

to the movie company?

KINNEAR: I gave some definitive guidance in that respect that any flying that was already in the training plan -- inasmuch as the end product is combat readiness, the commanding officer is always responsible toward trying to keep his squadron in a state of training that is commensurate with where we expect them to be at the staff level, and included in that, of course, are certain allocations of flying hours to be used for different things. Any flying hours that were going to be done in the way of, let's say, familiarization, post-maintenance check hops or test hops, those kinds of things, anything that would have been flown anyhow, it was not necessary that that be charged against the movie. However, any flying that was done beyond that that was already programmed in the training plan or included in some way in the prescribed activities of the squadron would have to be charged to the movie.

DEFENSE: All right, sir. Now, anything, of course that was directly required by the movie company exclusively and wouldn't have been otherwise was to be charged to the movie company; is that correct?

KINNEAR: That certainly would qualify for what I've said, yes.

DEFENSE: All right, sir. Then anything that was properly training was not to be charged to the movie company but to training, was it not?

KINNEAR: That's correct.

DEFENSE: And that was your policy established by you?

KINNEAR: That's also correct.

Admiral Kinnear further testified that cross-country flights are within the judgment authorization of squadron commanding officers to use in his training plan, are permissible as training and that this is usually spelled out in the syllabus. He also asserted that it would be consistent with the guidance he gave to say that there would be nothing improper in the relationship of the Navy with the movie people to charged to the movie company only that which was required that otherwise would not have been required (Tr. 1220-1222).

CROSS EXAMINATION: (Record p. 1220-1222)

DEFENSE: All right, sir. Now, — but the commanding officer had the highest responsibility in the squadron for devising and carrying out the training plan for his squadron?

KINNEAR: That's correct.

DEFENSE: And the commanding officer had, I would assume, did he not — didn't he have discretion, as commanding officer, as to how to carry out that plan, as long as it produced the required hours and whatever is required to effect training?

KINNEAR: Probably the most important guidance that he has is the amount of money he gets against which he can do his flying, and it's his responsibility to do his training within the dollar allowance of flying hour allocation; and if he's unable to do so, then he must communicate up the staff to the AIRLANT level to explain why he needs more money or, on the other hand, why he hasn't been able to spend his money.

DEFENSE: All right, sir. But the commanding officer — isn't he responsible to see that his pilots get a certain amount of flying time.

KINNEAR: That is one of his primary responsibilities.

DEFENSE: All right, sir. But he has that judgment auithority — the commanding officer?

KINNEAR: Yes.

DEFENSE: All right, sir. Now aren't cross- country flights within the judgment authorization of a commanding officer or a fighter squadron to use in his training plan, if he sees it as a proper way to effect the requisite training?

KINNEAR: A reasonable amount of cross-country flying would be appropraite, particularly if it were to different airfields for the purpose of indoctrination.

DEFENSE: All right, sir. And finally, there would be nothing improper in the relationship of the Navy with the movie people to charge to training that which properly could go to training and charge to the movie company only that which was required that otherwise wouldn't have been required; isn't that true?

KINNEAR: That would be consistent with the guidance I gave, yes.

The evidence therefore conclusively

supports Commander Brown's contention that he conformed explicitly to the direction given him by his superior officers to remain within budget constraints of 30 hours charged to the motion picture company; that when he was required to extend by 2.5 hours beyond that figure, he officially requested and received permission to do so and that he charged only that flying to the motion picture company which was legitimately charged to training in consonance with the guidance from the Commander, Naval Air Forces, Atlantic Fleet.

II. THE OPINION OVERLOOKS MATERIAL FACTS IN THE RECORD BY HOLDING THAT THE TELEGRAM SENT BY THE DEFENDANT TO DOUGLAS URGED DOUGLAS TO PAY CERTAIN ADMINISTRATIVE EXPENSES PROMPTLY IN ORDER TO AVOID A NAVAL INQUEST WHICH MIGHT DISCLOSE THAT FLIGHT HOURS HAD BEEN UNDERBILLED, WHICH

HOLDING FORMED THE BASIS FOR THE DEFENDANT'S CONVICTION OF RECEIVING A GRATUITY.

The Opinion states that "the evidence showed that in July 1979, when the producer and the Navy were engaged in a dispute concerning payment of certain administrative expenses, Brown telegraphed Douglas urging him to pay promptly since failure to do so might lead to a Naval inquest that might in turn disclose that flight hours had been underbilled.

Such a statement is misleading and incorrect. In fact, the actual telegram was not produced at trial by the Government, and the only evidence with regard to the contents other than that given by the defendant was merely speculation as to its contents by Commander Shupe and Agent O'Brien who had no first hand knowledge.

Defendant advised Agent O'Brien that he had

sent a telegram to Douglas from the Nimitz while enroute to the Mediterranean in response to a query from AIRLANT. The telegram was sent in mid-September, not July, six weeks subsequent to defendant's receipt of the check in reimbursement for his expenses. The defendant advised O'Brien that there was no relation between the check and the telegram; and that he had received approval of his Airwing Commander and the Captain of the U.S.S. Nimitz to send the telegram to urge Douglas to conform to his contractual obligations. He also advised O'Brien that adverse publicity and inaccurate interpretation of Navy cross-country flying had recently been the focus of media attention and that the same thing could happen in this instance. He advised him that he had been constrained to charge to the motion picture company no more than 32.5 hours and that he had explicitly accounted for all flying that was directly motion picture related

and charged that to the production company in accordance with navy guidance; he had charged all flying that would be routine training type flying, particularly the cross-country transit flights from NAS Oceana to Key West, to training in accordance with Navy guidance; and that during the period of the motion picture his squadron had flown approximately 200 total hours including training. He advised O'Brien that while more time could have been charged to the picture, it would not have been proper to do so as it was legitimate training flying and would have been in violation of the Navy's contractual obligations and the directives given him. In addition, he advised the Agent that any excess charges beyond the 32.5 hours would have adversely impacted the motion picture company and denied the Navy of the value of the motion picture as a recruiting, retention and public affairs film.

Defendant advised Shupe by telephone from Rota, Spain, that he expected Douglas to conform

to his contractual obligations and that Douglas knew his responsibilities with regard to the film. Brown told Shupe the same facts with respect to the flight hours. Further, the telegram sent by Brown from onboard ship was sent through the Naval Communication System and was open to review by the Executive Officer and the Commanding Officer of the ship, as well as all routine handlers of Naval message traffic. In fact, Brown testified that he discussed the telegram with the Captain of the Nimitz, Rear Admiral John Batzler, prior to sending it (tr. 1112-1124).

DIRECT EXAMINATION: (Record p. 1121)

DEFENSE: Commander, do you have an approximate date or an estimate of when the telegram was sent — when you had the conversation with Captain Batzler and the telegram was sent to Peter Douglas?

BROWN: Yes, sir. It was around the 18th or 19th of September 1979.

DEFENSE: And as of that time, had you seen any publicity before that time concerning Navy aircraft?

BROWN: On numerous occasions, and one stands out.

DEFENSE: And what can you tell us, Commander, without going into the details of it? What was your -- your feeling as far as the accuracy of the publicity that had been given locally about the use of Navy aircraft?

BROWN: I thought it was inflammatory and absolutely inaccurate and inappropriate.

DEFENSE: Did that appear -- did that have anything to do with the movie, --

BROWN: No, sir, it did not.

DEFENSE: -- what you considered to be inflammatory publicity, inaccurate publicity?

BROWN: No, sir.

DEFENSE: Had it appeared in the local newspapers before the movie was even started?

BROWN: Yes, sir, it had.

DEFENSE: And then what were you concerned about as far as the flight hours and the movie situation when you sent the telegram to Douglas?

BROWN: Precisely the same type of inflammatory news article.

DEFENSE: Well, what do you mean? Why did that concern you? What did you think might happen?

BROWN: There was a question about cross-country flying as being training. It was directed towards a specific squadron in which some flying was done for the purpose of a wedding of one of the squadron members.

DEFENSE: Well, you're talking about the prior publicity?

BROWN: That's correct.

DEFENSE: All right. Now what was your concern -- directed now to the day you sent the telegram and talked to Captain Batzler -- what was your concern about the flight hours that -- in the movie situation?

BROWN: Misinterpretation of the cross-country requirements.

DEFENSE: Well, are you saying that you believe the press, if they heard it, might misinterpret it?

BROWN: Yes, sir. It wasn't a matter of interpretation. It was a matter of the way it possibly could be interpreted. News is inflammatory.

DEFENSE: Did you have any concern that the division of the hours was itself improper?

BROWN: Absolutely not. That's been covered by COMNAVAIRLANT, in response to this one news article.

DEFENSE: Well, I'm asking you: At the time you sent the telegram and discussed it with the captain of the NIMITZ, did you have any concern that the hours had actually been illegal or improper in any way?

BROWN: Absolutely not.

DEFENSE: When you and the captain of the NIMITZ discussed it, without going into the discussion and the details, was it a full discussion and disclosure, or what?

BROWN: There was a full discussion; yes, sir.

,Admiral Batzler was subpoenaed to appear at trial but was unavailable due to assignment to a Navy selection board..

III. THE OPINION OVERLOOKS MATERIAL FACTS IN THE RECORD BY HOLDING THAT THE CHECK RECEIVED BY BROWN WAS "FOR OR BECAUSE OF" EITHER UNDERSTATING THE NUMBER OF HOURS OF FLIGHT TIME CHARGED TO THE MOVIE OR GRATUITOUSLY REMAINING SILENT WHEN DISCLOSURE OF THE FACT THAT THE NUMBER OF HOURS WAS UNDERREPORTED WAS REQUIRED BY NAVY REGULATIONS, WHERE THE CLEAR EVIDENCE WAS THAT SUCH CHECK WAS TO REIMBURSE BROWN FOR MONIES SPENT DIRECTLY OUT OF HIS OWN POCKET FOR RENOVATION AND REMODELING OF HIS SQUADRON'S SPACES AND FOR EXPENSES INCURRED BY HIM PERSONALLY IN CONJUNCTION WITH THE FILMING.

The Opinion states that the contract between the motion picture company and the Navy did not allow the producer to contract with any Navy personnel for the performance of Movie related services. This, in fact, is not a correct statement.

The agreement actually was that "no Navy people would be paid for any work they did on the motion picture while they were performing their official functions" (Tr. 174-175).

DIRECT EXAMINATION: (Record pp. 174-175)

GOV'T: First of all, Mr. Graves, did you participate in the making of any agreements respecting how Navy personnel would be reimbursed for participation -- individual participation in this particular movie?

GRAVES: Yes, I did.

GOV'T: And with whom did you make this agreement?

GRAVES: With the producer, Peter Douglas.

GOV'T: Okay. And will you please tell us what provision, if any, was made for reimbursement of individual Navy members for participation in this movie?

GRAVES: The agreement was like any other picture: That no Navy people would be paid for any work that they did on the motion picture while they were performing their official function.

There was no evidence that the defendant

was paid for work that he had done. His contention was that he was reimbursed for out of pocket expenses that were applied to upgrading squadron spaces and other activities that occurred in supporting the motion picture production at cost. He was not paid for services in that he received no personal gain.

The distinction between reimbursement for out of pocket expenses and reimbursement for services is of extreme importance and was not developed in the testimony by Captain Graves. It is the difference between accepting a gratuity on the one hand and simply having monies returned that were properly expended on the other.

Captain Graves stated that "he tried to stay away from the subject of contribution to Navy units" (Tr. 176, 177).

DIRECT EXAMINATION: (Record pp. 176-177)

GOV'T: As a part of the agreement you made with Peter Douglas, did you make any provision for

contributions to the United States Navy as a result of its participation in the movie?

GRAVES: Would you define "contribution"?

GOV'T: When I say "contributions," did you make any agreement respecting how the movie company would show its appreciation, if any, for the Navy's participation in the movie?

GRAVES: Okay. That was a subject that I tried to stay out of, but it was my responsibility to answer questions from Peter Douglas in this regard, and it is customary -- and it was done in this picture -- that a motion picture company would make a donation to the ship or squadron that assisted them in the production of the picture.

He would not have been in a position, therefore, to know of any arrangement that Peter Douglas had made with Commander Brown to reimburse him for expenses. This, in fact, was <u>not a contribution</u> and at no point was ever proven to be a contribution in the transcript. The check in issue was never intended to be a donation as such to the squadron welfare and

recreation fund and was not required to transit the Navy chain of command. Commander Brown provided the work in his Squadron spaces in accordance with direction of the Chief of Naval Operations to provide full cooperation to the motion picture company. Further direction and guidance were not provided, as asserted by the Navy project cost collector, Commander Robert Shupe (Tr. 530).

CROSS EXAMINATION: (Record p. 530)

DEFENSE: All right. Now, you received notice or word of the situation, that is, a movie was going to be made with Navy cooperation even before the costs started to be incurred, did you not?

SHUPE: That's correct.

DEFENSE: And from whom did you get that?

SHUPE: Got that from the office of the CNO. ... Chief of Naval Operations.

DEFENSE: And weren't you told at that time that the Navy was cooperating with the movie company? Correct?

SHUPE: Absolutely.

DEFENSE: And what were you told, in essence, about expenses? Just generally?

SHUPE: Well, I wasn't told anything. The only thing we had in terms of direction was the message, and the message said it was the full cooperation — the movie company had full cooperation and that we were to collect costs as they arose and report them.

The out of pocket expenses for which Commander Brown received the check were for improving squadron spaces in preparation for filming of the motion picture. The squadron was to benefit from these space improvements as they would be permanent in nature; however, the primary function of the improvements was for filming. Testimony in the transcript from Lieutenant Miller (App. 223-227), Commander Eastman (Tr. 698; App. 229; Tr. 702, 703), Chief Warrant Officer Bulick (App. 262a-262b, 264-266), and Chief Roger Maccallum (Tr. 680-688) support the contention by Commander Brown that he did

indeed upgrade and improve squadron spaces applying his own funds.

DIRECT EXAMINATION: (Record p. 664)

DEFENSE: All right. Now did you observe anything unusual concerning the ready rooms — the squadron ready rooms when Emory Brown was executive officer and commanding officer?

MILLER: Well, the ready room — since you spend so much time in it, it has to be a place, for morale purposes, where people can want to be there and can perform there. ... I observed the fact that when Commander Brown came to the squadron, our ready room was a shambles, and as he became commanding officer, he directed people to bring it up to a place where we would enjoy being there. And so we went from a very low morale state to having the best ready room, and people would want to come and spend time with us on the ship.

DIRECT EXAMINATION: (Record p. 680-683)

M'CALLUM: And I was the — I guess you'd call it the duty carpenter. I can build anything.

DEFENSE: You can do what?

M'CALLUM: I can build anything.

DEFENSE: Well, did your duties put you in actual contact with the executive officer or commanding officer?

M'CALLUM: Yes, I built a lot of things for him.

DEFENSE: Well now, when you say you built things for Commander Brown, were they for the squadron?

M'CALLUM: Yes, sir.

DEFENSE: Would you tell us -- would you elaborate a little? Explain what you mean by building for Commander Brown for the squadron.

M'CALLUM: Okay. When Commander Brown had come to the squadron in -- and we had been in a transition period from one type of aircraft to another and we had been sitting around going from one school to another, and whatever, and our squadron spaces at Oceana, in the Hanger, they were just, you know, drab type places, not a nice type environment to work in. We were getting ready to go on a nine-month cruise with a new aircraft, all new crew, and whatever, and we redid all the maintenance spaces and built bulletin boards, podiums, and picture frames, cabinets; just dressed up the working areas to make it, you know, a better place to work.

DEFENSE: And whose -- whose -- who initiated that? Whose idea was that?

M'CALLUM: Commander Brown.

DEFENSE: When did he initiate that effort, was he then the executive officer or commanding officer?

M'CALLUM: He was the executive officer.

DEFENSE: Had his predecessor, the man before him, or anybody in the squadron before him done anything like that for the spaces for the men?

M'CALLUM: No, sir.

DEFENSE: And over what period of time did you actually work on improving those working spaces for the men?

M'CALLUM: The whole time, in all my spare time. I started to run the weapons shop also. I did it, and mostly in my spare time. ... It was probably a period of six to eight months, I reckon.

DEFENSE: You've been in the Navy eighteen years?

M'CALLUM: Yes, sir.

DEFENSE: Have you ever seen anything compared to that effort to improve the spaces for the men in any other outfit?

M'CALLUM: No, sir.

DEFENSE: Did you do any of that on your own time?

M'CALLUM: Yes, sir.

DEFENSE: Were you compensated when you worked on your own time?

M'CALLUM: Sure was.

DEFENSE: Do you know where the money came from to pay you to fix up the men's spaces?

M'CALLUM: Commander Brown.

DEFENSE: From his own pocket?

M'CALLUM: Yes, sir.

CROSS EXAMINATION: (Record p. 685-686)

GOV'T: Now, you've indicated you did a lot of carpentry work. When you did a lot of this carpentry work, it required a lot of materials; is that correct?

M'CALLUM: Right.

GOV'T: And to get the materials, you had to expend a lot of funds?

M'CALLUM: Right.

GOV'T: And did you personally pick up these materials that you used?

M'CALLUM: Sure did.

GOV'T: And did you personally go out and purchase the materials?

M'CALLUM: Yes.

GOV'T: And in purchasing the materials, did you use your own money?

M'CALLUM: No.

GOV'T: What money did you use?

M'CALLUM: Commander Brown's.

GOV'T: Okay. When you say Commander Brown's, did you see — have you ever heard of the self-help fund?

M'CALLUM: Right.

GOV'T: Did you ever go to the self-help fund to get funds?

M'CALLUM: No, sir.

GOV'T: Have you ever heard of the imprest fund?

M'CALLUM: No, sir.

GOV'T: Now, can we take it that you assumed Commander Brown used the money out of his own pocket? Is that correct?

M'CALLUM: Right. They were his personal checks.

GOV'T: Okay. Personal checks drawn on what? Were they drawn on his personal account?

M'CALLUM: His account. They were his name and his wife's.

GOV'T: Okay. Now did you ever make a request for any type of funds or anything from the Navy in order to obtain material to do carpentry work?

M'CALLUM: No, Sir.

DIRECT EXAMINATION: (Record p. 698-699)

DEFENSE: Did the making of the movie, based on your own personal observations, in any way affect the morale of VF-84's personnel in one way or the other?

EASTMAN: Yes, sir, I think it affected it in a positive fashion. We were — most of us were — most of the squadron was involved in one way or another, either at Key West or on board the ship, and as a result of this, a certain amount of money had been allocated to be utilized for basically improvements in squadron spaces.

DEFENSE: Well, did you see any improvements yourself in the squadron spaces?

EASTMAN: Yes, sir, and specifically on

board the ship, we had — one of the hardest things to have accomplished is — our enlisted personnel sleep in bunks that are three — stacked three high, and that's not eactly the most private place. So what we accomplished there was: We got curtains for each one of those bunks made of nomex material, which is fire-resistant, something you need aboard ship, and that was — allowed our enlisted personnel some privacy. We had aboard ship also retiled the ready room; we were able to panel it. I believe we put in a drop ceiling. We had a VTR recorder, which enabled us to get the latest movies, and this type of thing, from the states.

DEFENSE: All right, sir. And were those improvements that you've outlined — did they occur during the time period of the movie being filmed?

EASTMAN: To the best of my recollection, yes, sir. ... A lot of these improvements, sir, were made for the movie also. We were utilizing the spaces and we wanted them to look particularly good for the movie itself.

DEFENSE: And during that time, Emory Brown was the commanding officer of VF-84?

EASTMAN: Yes, sir.

DIRECT EXAMINATION: (RECORD P. 840-841)

DEFENSE: Well, were you there when the motion picture was being filmed?

BULICK: Yes, sir. I was in Key West. I was the maintenance officer in charge of the maintenance people keeping the aircraft up.

...

DEFENSE: What can you tell us about anything you observed, one way or the other, about Emory Brown's effforts concerning the welfare and comfort of his men?

BULICK: Well, he had nomex bunk curtains made up for the crew. We redone the ready room on the NIMITZ; we redone the ready room at Oceana; we redone the career counselor's office. ... He brought us — for the ordnance shop, he brought us catalytic heaters and fuel because, in November, the one year, the heat wasn't turned on yet and my people were cold in the space we were in. So he brought those in for us.

DEFENSE: Do you know how he got those or how they were paid for?

BULICK: No, sir, I don't,.

DEFENSE: All right. Do you know of any instances when he paid for things to help the men out of his own pocket?

BULICK: Yes, sir. He bought the fuel for them. I've watched him give the duty driver money to go buy fuel for the catalytic heaters.

DEFENSE: With relation to the movie, do you or did you know at the time, one way or the other, whether the squadron itself would benefit in any way from the fact that they were helping to make the movie?

BULICK: I think that was common knowledge throughout the squadron, that we were going to get benefits from this movie to help fix up the ready room on the ship, the VTR's and stuff like that.

DEFENSE: All right. And did or did not that happen, to your observation, during the time that the movie was being made?

BULICK: Yes, sir, it did.

REDIRECT EXAMINATION: (Record p. 846-848)

DEFENSE: I just ask you this: Mr. Bulick, do you know whether or not, in Key West, besides the photography that the movie production was engaged in, was anybody doing any photography for the squadron?

BULICK: We took a photographer with us...His name is Robinson.

...

DEFENSE: Did you see the skipper do anything at the time?

BULICK: He gave Airman Robinson $200.00 to buy .35 millimeter film, as much as he could get with it.

DEFENSE: All right. And where -- where did you see -- You say he gave him $200.00. How do you know he gave him the money?

BULICK: Because he gave him two $100.00 bills.

DEFENSE: Well, where did he get it?

BULICK: Out of his wallet.

The statement in the Opinion that "the contract between the motion picture company and the Navy did not allow the producer to contract with any Navy personnel for performance of any movie related services" is inaccurate and improperly addresses the actual situation that occurred and the actual statement by the technical adviser, Captain Graves.

The Opinion states that according to the testimony of Navy Project Officers there would be

"no reason for Commander Brown to receive a check from the motion picture producer unless it was destined for the ship's recreation fund in which case Brown should have forwarded it to the Secretary of the Navy" and the statement that "the testimony at trial indicated that Brown did receive such a check and did not forward it" misconstrues the factual situation.

The subject of the check as to reimbursement of expenses was never developed with the witness. The testimony at the trial did not support the contention that Commander Brown did receive such a check destined for the ship's recreation fund. Captain Graves testified that he had prepared a message for release by the Chief of Naval Operations that "the Navy should benefit from the movie in the areas of recruiting, retention, and demonstration of capabilities at sea." Commander Brown maintained that his actions in improving the spaces in his

squadron were in support of morale, recruiting and retention. The trial testimony of officers assigned to his squadron and previously cited fully bears out this contention. Captain Graves stated that he had "tried to stay out of" the subject of appreciation to the squadron by Peter Douglas, as he had "done a half a dozen movies before this one, and when I took the job, I was indoctrinated by an expert about conflicts of interest" (Tr. 186). Captain Graves conceded that such contributions were made by the production company and that by staying out of it, he did not know what agreements were made with the squadron and the ship as to what was going to be done for them in appreciation (Tr. 187). Captain Graves further stated that he did not know whether or not any contributions were authorized by the Secretary of the Navy because he was off active duty when the movie was finished (App. 70b).

CROSS EXAMINATION: (Record p. 186)

DEFENSE: Now you said, Captain that you tried to stay out of the subject of appreciation by Peter Douglas, his showing appreciation to the squadron, or a member of the squadron?

GRAVES: Yes.

DEFENSE: What do you mean by: You tried to stay out of it?

GRAVES: I — this is — I had done a half-dozen movies before this one, and when I took the job, I was indoctrinated by an expert about conflicts of interest, and I did not want to be — or give the impression that anything that I was doing, because my job had a major impact on Navy cooperation on the picture — I didn't want — I didn't want to give the impression that benefits to Navy personnel officially were a consideration that I was involved in either making or being a part of. So I was not really involved in contributions. I like to use the word "donations" that were made to the — to the ship and the squadron after the fact.

DEFENSE: All right. Now, then, what you're saying is that when Peter Douglas did make contributions to the squadron and to the ship, we're talking about the NIMITZ —

GRAVES: Yes.

DEFENSE: I don't want to misquote you. I thought you said that. Didn't you say that you stayed out of contributions to the squadron and the ship?

GRAVES: Yes.

DEFENSE: That's what you did say.

GRAVES: That's what I said.

DEFENSE: They were made by Peter Douglas, weren't they?

GRAVES: The production company.

DEFENSE: All right. And by staying out of it, you really don't know what his agreements were with the squadron and the ship as to what he was going to do for them in appreciation?

GRAVES: That is correct.

COURT: Well, wait a minute. Captain, you testified something about the approval for any donation having to be gotten from the Secretary of the Navy, or somebody.

GRAVES: The donation is made to the Secretary of the Navy in the name of the squadron and he authorizes it to go back to the squadron or ship into their recreation fund.

COURT: And you said that was done in this case?

GRAVES: I cannot say for sure because I was off active duty when the movie was finished, but it's customary; yes, sir.

Captain Graves' statement that he could see no circumstances that Commander Brown would be accepting a payment from Peter Douglas unless he accepted the check that was destined for the recreation fund (App 73) is pure speculation and was never supported in the transcript. His statement that there is no reason for any payment to any navy people by the production company is correct to the extent as to payment for services, but does not address the distinctly different issues of reimbursement for expenses incurred.

There was absolutely no evidence that Commander Brown did not have permission from the Secretary of the Navy or the Chain of Command to accept reimbursement for expenses incurred nor

was it ever shown that he was required to have such permission.

It is respectfully submitted that the Court either misinterpreted or overlooked material facts in the record, and that accordingly there was insufficient evidence to support the defendant's conviction of illegally receiving a gratuity.

IV. THE OPINION OVERLOOKS MATERIAL FACTS IN THE RECORD BY HOLDING THAT THE DEFENDANT MADE A PROFIT FROM THE SALE OF HATCH COVER TABLES AND A NAUTICAL BLOCK LAMP, WHICH FORMED THE BASIS FOR DEFENDANT'S CONVICTION OF THE THREE (3) COUNTS OF CONFLICT OF INTEREST, WHERE THE EVIDENCE WAS THAT THE DEFENDANT MADE NO SUCH PROFIT.

The Opinion incorrectly states that the defendant conceded that he had made some profit

from the sale of hatch cover tables. In so doing, the Court has misconstrued the statements made by the defendant with regard to the sale of the hatch cover tables. Defendant testified that he sold hatch cover tables through Aquarius Gift Shop either: (1) On a consignment basis to the public, for a profit, with 1/3 of the sales price going to the shop and 2/3 to the defendant; and (2) On the basis of a straight non-profit sale to the Navy with the entire sales price being retained by the gift shop and applied toward curtailment of the Navy's account receivable (App. 322-326).

CROSS EXAMINATION: (Record p. 437-445)

DEFENSE: Mr. Rice, I think you testified that there was a consignment basis for some of these tables?

RICE: Yes, sir, that's true.

DEFENSE: All right. Now, there were -- there were some tables that Commander Brown brought to you that were sold to the public, not -- not to anybody in the Navy;

isn't that true?

RICE: That's true, sir.

DEFENSE: Now, is it not true that in those sales, with those sales to persons from the public, there was the consignment arrangement, that is, one-third of the price goes to you, two thirds goes to the Commander?

RICE: This is true.

DEFENSE: All right. Now, it's also true, is it not, that there were some tables placed with you that went to his squadron?

RICE: This is true.

DEFENSE: Now, can you tell us, first of all, how many tables do you recall that you ever sold for Commander Brown, over all the years, to the public? Do you have some general idea?

RICE: I would say there's no more than four.

DEFENSE: All right. An how about to the navy? Do you recall how many tables you ever sold in ten years to the Navy?

RICE: About the same number. Four or five, I would say.

DEFENSE: Now, as to those tables sold to

the squadron, were those sold on a consignment basis or were those -- or was that just a straight sale --

COURT: Now, are you using Navy and squadron interchangeably? Sometimes you refer to tables sold to the squadron; sometimes you talk about tables sold to the navy; and I don't know whether you're using those terms interchangeably.

DEFENSE: I am, Your Honor. I'll make it clear.

RICE: I answered it that way, Your Honor. That's what I thought he meant. The squadron and the navy are the same.

COURT: All right.

DEFENSE: Well, those four or so tables that went to the squadron, what was the arrangement on those? Were you to get two thirds, or did it all go to you?

RICE: It was all mine, sir.

DEFENSE: All right. Now, I'd like to ask you about that. Now, didn't Emory Brown's squadron have an open account, that is, an account with your shop for framing and various things to be done for the squadron?

RICE: Yes, sir, he did.

DEFENSE: All right. Now isn't it a fact that there was money that the squadron owed you as — as a merchant -- as a businessman for doing things that you had done for the squadron?

RICE: Yes, sir, that's true.

DEFENSE: And didn't you understand there was nothing wrong with you doing the framing for the squadron, did you.

RICE: No, sir, there's nothing wrong.

Mr. Russell Rice, a government witness, confirmed this arrangement and the fact that defendant made no profit on any sales of tables to the Navy (App. 163-165 and App. 167-172) and that he actually donated the proceeds from those tables which had a fair market value of $400.00 to $600.00, but were sold for only $145.00 to payment of the Navy's account at his shop.

CROSS EXAMINATION: (Record p. 443)

DEFENSE: Now, the tables that were placed

with you by the Commander and that went to the squadron, isn't it a fact that the money that was paid by the squadron for those tables went entirely to you to take care of the things you had done for the squadron?

RICE: That's true.

DEFENSE: Isn't it true that, as far as you know, Commander Brown didn't get a red cent from the sale of his tables to his squadron?

RICE: I don't know, sir.

DEFENSE: But as far as you know, the purpose of that, was it not, was to take care of the money the squadron owed you for what you had done?

RICE: Yes, sir, that was my understanding.

COURT: It cancelled out an account receivable: is that what you're talking about?

RICE: We had one rolling, yes, Your Honor.

COURT: All right. But two-thirds of the cost of the table went to -- applied to accounts receivable for Commander Brown's squadron; is that right?

RICE: No, sir, it didn't. The two

thirds that — I don't know where the money went, Your Honor, but, again, there were — hatch tables sold in two different ways. In the first situation, I sold my to my customers that came into the store. There was a consignment basis. I got a third and Commander Brown got two-thirds. That's one area. The other area is what he just discussed — I believe I'm right here — is that we — the hatch tables that were sold to the squadron were in payment to the work that I had done for the squadron, and there was no one-third, two-thirds. that was all my money. If I — the squadron — the hatch table that came in through me was in payment for the framing work that I did. There was no consignment basis there, as far as equitable share of one-third and two-thirds. It was a hundred percent.

COURT: I see. So that one hundred percent of what the Navy paid you went to cancel —

RICE: Accounts receivable.

COURT: — Accounts receivable —

RICE: Yes,sir.

COURT: — for the squadron?

RICE: Yes, sir.

CROSS EXAMINATION: (Record p. 445-446)

DEFENSE: All right. Now, what was the price, roughly, if you recall, as to those four or five tables that were sold with the Commander's assistance to the squadron? Do you recall the price -- the purchase price?

RICE: I would say it's around $150.00.

DEFENSE: All right. Now, how does that compare with your understanding of the fair market price at that time for a hatch cover table of that size that would have been going to any other person or any other place?

RICE: I would say the fair market value of a hatch table built the same way was around -- between four and six hundred dollars.

Of particular significance is the testimony of Mr. Rice with respect to the nature of questioning by Special Agent O'Brien in which no distinction was permitted between Navy and consignment sales to the public thereby permitting the illusion that a profit had been realized on sales to the Navy (App. 172-174).

RECROSS EXAMINATION: (Record p. 452-454)

DEFENSE: Mr. Rice, back when you were questioned by the agent back in 1980 about these particular facts, were you asked whether or not there were two separate accounts, an account for the squadron and an account for Commander Brown, or were you just asked about Commander Brown in general?

RICE: Well, in answer to your first question: No, there was no specification as to whether I was getting -- what percentage or not, no.

DEFENSE: All right. Well, what I mean is: isn't it a fact that the agent was asking you the questions and you were answering them? Is that —

RICE: That was true.

DEFENSE: You were not — you were not the one who was giving him all the information? He didn't just say, "Tell me everything you know about Commander Brown and the tables," did he?

RICE: No, sir, he never did.

DEFENSE: He was pointing you in the direction with his questions, wasn't he?

RICE: Yes, sir, he was.

DEFENSE: Now, his questions to you were about Commander Brown and Commander Brown's account with you, weren';t they?

RICE: Yes, sir, they were.

DEFENSE: They were not questions to you about the squadron's account and how that account related to hatch cover tables that were sold with Commander Brown's assistance, were they?

RICE: No, sir.

DEFENSE: Commander Brown had a personal account with your shop, didn't he?

RICE: Yes, sir, he did.

DEFENSE: That was different from the squadron account, wasn't it?

RICE: Yes, sir, it was.

DEFENSE: And as far as you can recall, is it your recollection today in court under oath that the moneys which were gotten from the sale of tables through Commander Boown to the squadron -- those moneys didn't go to take care of Commander Brown's account.

RICE: No, sir, they didn't.

Defendant testified that he told O'Brien he made no profit on the sale of tables to the Navy. O'Brien advised him that the cost of materials would not count and asserted that the defendant then "indicated that he possibly made a profit on some of the tables" (App. 201).

CROSS EXAMINATION: (Record p. 611-613)

DEFENSE: -- About the sales of those tables.

O'BRIEN: Uh-huh.

DEFENSE: He told you that the squadron could get them that way at half the price they could get them from a commercial source, didn't he?

O'BRIEN: That is correct.

DEFENSE: And he told you that he made no profit from them, didn't he?

O'BRIEN: At first he told me that.

DEFENSE: All right, sir.

O'BRIEN: The he told me he did make a profit.

DEFENSE: Well, the reason he told you, as you say, that he made a profit is

that — Well, who pointed out to him that materials would not count for the purchase price? Who told him — Well, "If you say you didn't make a profit, your giving materials doesn't count," who told him that?

O'BRIEN: I told him that.

DEFENSE: I direct your attention to page — well, it's page 12 of your notes —

O'BRIEN: Uh-huh.

DEFENSE: — at the top of the page. Your notes are: "Commander Brown indicated he got no profit from the sale of these tables, but when it was pointed out that materials would not count for the purchase price, he indicated that he possibly made a profit on some of the tables." Is that what happened?

O'BRIEN: That's correct.

This manipulation of facts and semantics to create the illusion of a profit does not comport to a concession by Commander Brown that he made a profit. On the contrary, the testimony of Rice and O'Brien clearly demonstrate an effort by the

Government to bend a situation in which Commander Brown donated his tables to the Navy or was reimbursed only for cost of materials into a profit transaction.

The evidence presented at trial does not support a finding that the defendant made a profit on the sale of any tables to the Navy. On the contrary, he applied his labor in a hobby without payment and supplied his tables to the Navy at no cost or at cost of materials only. Logic would certainly support the contention that this officer was providing a service to the Government for which only the Government profited and that he, therefore, had no financial interest to serve as a basis for conflict of interest. Had Commander Brown purchased the materials in the customary manner through Navy self-help and the constructed the tables and provided them to the Navy, he would have accomplished the same means at the same cost with no possible question

of conflict of interest.

It is, therefore, respectfully submitted that the Court has either overlooked material facts or has misconstrued the evidence with regard to the defendant having made a profit on the sale of hatch cover tables, and accordingly the evidence was insufficient to support his conviction on the three charges of conflict of interest.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the defendant should be granted a re-hearing en banc and that the defendants convictions on the charges as aforesaid should be granted a new trial as to each of the Counts of which he was convicted.